

1 KEKER, VAN NEST & PETERS LLP  
2 ELLIOT R. PETERS #158708  
3 epeters@keker.com  
4 ERIC H. MACMICHAEL #231697  
5 emacmichael@keker.com  
6 JULIA L. ALLEN #286097  
7 jallen@keker.com  
8 BENJAMIN D. ROTHSTEIN #295720  
9 brothstein@keker.com  
10 BAILEY W. HEAPS #295870  
11 bheaps@keker.com  
12 DEEVA SHAH #319937  
13 dshah@keker.com  
14 CHRISTINE M. ZALESKI #331727  
15 czaleski@keker.com  
16 633 Battery Street  
17 San Francisco, CA 94111-1809  
18 Telephone: 415 391 5400  
19 Facsimile: 415 397 7188

20 Attorneys for Defendants  
21 NIXON PEABODY LLP and  
22 FORREST DAVID MILDER

23 UNITED STATES DISTRICT COURT

24 EASTERN DISTRICT OF CALIFORNIA

25 SACRAMENTO DIVISION

26 SOLARMORE MANAGEMENT  
27 SERVICES, INC., a California corporation,

28 Case No. 2:20-cv-02446-TLN-DB

Plaintiffs,  
v.  
NIXON PEABODY, LLP, a New York limited  
liability partnership; FORREST DAVID  
MILDER, a married individual,  
Defendants.

**REPLY IN SUPPORT OF DEFENDANTS  
NIXON PEABODY, LLP AND FORREST  
DAVID MILDER'S MOTION TO  
DISMISS**

DATE: On submission  
TIME: On submission  
CTRM: 2  
JUDGE: Hon. Troy L. Nunley

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1     **I. INTRODUCTION**

2                 Assignees' Opposition ("Opp.") attempts to rewrite the Complaint and California law to  
 3 save an irredeemably deficient pleading. Three independent reasons warrant dismissal.

4                 ***First***, Assignees lack standing because legal malpractice claims are nonassignable under  
 5 California law. Assignees' argument that the "'gravamen' of the action is fraud," rather than  
 6 malpractice, ignores California authority holding that malpractice claims based on intentional  
 7 misrepresentations cannot be assigned, and that fraud claims themselves are also non-assignable.

8                 ***Second***, Assignees lack standing because Solarmore itself lacked standing to seek  
 9 derivative losses. Just as Judge Mendez twice found on similar facts in *Solarmore I*, Solarmore's  
 10 alleged harm was "merely incidental to the injury suffered by the [Fund] LLC" of which it was a  
 11 member, and can be asserted only through a derivative action.<sup>1</sup>

12                 ***Third***, each claim is pleaded without the requisite particularity.

13                 Because amendment will not remedy a lack of standing, Nixon respectfully requests that  
 14 the Court dismiss the Complaint with prejudice.

15     **II. ARGUMENT**

16         **A. California law prohibits assignment of legal malpractice actions.**

17                 The Opposition does not dispute that California law prohibits assignment of legal  
 18 malpractice claims. *See Opp. 4*. Instead, Assignees argue that the "gravamen the claims are [sic]  
 19 misrepresentation and fraudulent omissions, not professional negligence." *Id.* But the Complaint's  
 20 text belies that contention and Assignees' arguments do not support an exception from that "well-  
 21 established" California rule. *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 504 (1999).

22         **1. The gravamen of the Complaint is legal malpractice.**

23                 Assignees' argument that the "'gravamen' of the action is fraud . . . not legal malpractice,"  
 24 *Opp. 1*, is wrong. The Complaint alleges a "Legal Malpractice" claim for breach of a "duty to use  
 25 the skill, prudence, and diligence as commonly exercised by other members of the legal  
 26 profession," Compl. ¶ 149, and each remaining claim has at its core the same allegation that

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27  
 28                 <sup>1</sup> See *Solarmore Mgmt. Servs., Inc. v. Bankr. Est. of DC Solar Sols.*, No. 19-cv-02544, 2021 WL  
 3077470, at \*4 (E.D. Cal. July 21, 2021) ("Solarmore I").

1 Nixon breached duties to Solarmore arising out of Nixon’s role as attorney. *See Compl.* ¶¶ 112,  
 2 114, 118, 123, 125-26, 133, 136, 138, 144, 163. Each claim thus sounds in malpractice—  
 3 prohibiting assignment. *See Jackson v. Rogers & Wells*, 210 Cal. App. 3d 336, 348 (1989)  
 4 (assignment prohibited where the “gravamen” of the complaint is for malpractice).

5 California courts have expressly rejected Assignees’ proffered exception based on an  
 6 attorney’s alleged intentional misrepresentation.<sup>2</sup> In *Jackson*, as here, the plaintiff argued that the  
 7 rule “prohibiting assignment of legal malpractice causes of action . . . should not bar [his] action”  
 8 because his claims “sound[ed] in fraud” and his attorneys engaged in an “intentional course of  
 9 misconduct.” *Id.* at 338, 340; *see also* Opp. 5 (arguing that allegations of “intentional deception”  
 10 precluded finding that claims sounded in malpractice). The *Jackson* court held that the alleged  
 11 misconduct “arose entirely out of” an attorney-client relationship, so while styled as fraud, the  
 12 claims’ resolution would require evaluation of “strategic choices made in the past in a  
 13 confidential relationship in which the current plaintiff had no part.” *Id.* at 346. As a result, the  
 14 gravamen of the action was malpractice. *Id.* at 348. The same is true here. *See Mot.* 8-9.

15 Even if Assignees were correct that the “‘gravamen’ of the action is fraud,” assignment  
 16 would *still* be prohibited. Opp. 1. Under California law, “[a] right to complain of fraud is not  
 17 assignable.” *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 398 (1976). There is a narrow  
 18 exception to that rule for fraud claims that “involve rights in specific property obtained by fraud  
 19 or deceit,” but “disputed billings which arose from an ongoing attorney-client relationship are not  
 20 sufficiently analogous to a specific, identifiable piece of property . . . to support the assignability  
 21 of a cause of action for fraud.” *Jackson*, 210 Cal. App. 3d at 347.

22 Thus, the assignment of this action is barred by California public policy.

23 **2. California law rejects Assignees’ novel “clear nexus” exception.**

24 <sup>2</sup> Assignees’ reliance on the *Landmark* case is misplaced. Opp. 4. *Landmark* relates to a statute of  
 25 limitations defense concerning malpractice and fraud claims, not the prohibition on assigning  
 26 malpractice claims. The *Landmark* court dismissed the plaintiff’s malpractice claim, but  
 27 eschewed the “‘gravamen’ approach” in declining to dismiss the fraud claim because the plain  
 28 language and caselaw for the statute at issue compelled it to do so. *See Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP*, 2009 WL 160214, at \*6 n.5 (N.D. Cal. Jan. 20, 2009). In assignment cases, California courts are clear that “[a]n injury suffered by reason of a defendant’s conduct gives rise to a single cause of action, regardless of how many theories are pled by the complaint.” *Kracht v. Perrin, Gartland & Doyle*, 219 Cal. App. 3d 1019, 1022 (1990).

1       Next, Assignees argue that the malpractice claim is assignable because it does not  
 2 “implicate[]” “the public policy considerations underlying the rule against assignment.” Opp. 6.  
 3 In doing so, Assignees ask this Court to adopt a broad and novel exception to the general rule  
 4 precluding assignment of malpractice claims—namely, whenever the assignee and assignor have  
 5 “a clear nexus.” Opp. 6, 10. California law forecloses such an exception.<sup>3</sup>

6       California courts recognize only *one* “narrow” exception to the rule prohibiting  
 7 assignment, which is set forth in *White Mountains* and is limited to “the particular facts” of that  
 8 case. *White Mountains Reinsurance Co. of Am. v. Borton Petrini, LLP*, 221 Cal. App. 4th 890,  
 9 909 (2013); *see also Lesa, LLC v. Fam. Tr. of Kimberley & Alfred Mandel*, 2016 WL 1446770, at  
 10 \*8 (N.D. Cal. Apr. 13, 2016) (describing *White Mountains* as the “one exception to the rule of  
 11 nonassignability of legal malpractice claims”). *White Mountains* requires an assignee show that  
 12 the assignment: (1) is an “incidental part of a larger commercial transfer”; (2) is not  
 13 “functionally analogous to the assignment of a bare malpractice cause of action”; and (3) involves  
 14 “an insurance company.” *In re S&B Surgery Ctr.*, 707 F. App’x 928, 929 (9th Cir. 2017) (internal  
 15 quotations and alteration omitted). The Ninth Circuit has recognized this “*White Mountains test*”  
 16 determines when assignment of a malpractice claim is permitted and emphasized that the  
 17 exception is narrow.<sup>4</sup> *Id.* None of the three factors are met here. The exception does not apply.

18       California courts have also rejected Assignees’ proposed “clear nexus” exception,  
 19 consistently enforcing the prohibition on assignment between parties with a prior relationship. *See*  
 20

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21 <sup>3</sup> Plaintiffs briefly argue that assignment should also be allowed where the transfer occurs after  
 22 the Assignor files suit, Opp. 8, but cite no authority to support that exception. Allowing parties to  
 23 commodify malpractice claims by filing a Complaint *then* transferring claims (as Solarmore did  
 24 here) would encourage circumvention of the well-established rule prohibiting assignment through  
 25 a simple procedural mechanism. Any assignment of a malpractice claim threatens to undermine  
 26 attorney-client trust, weaken zealous advocacy, increase malpractice claims, and commercialize  
 27 claims, regardless of whether the complaint is filed by the assignor or assignee. Plaintiffs’  
 28 procedural ploy exception should be rejected.

29 <sup>4</sup> Other federal courts interpret California law in accord. *See Busbice v. Vuckovich*, 2018 WL  
 30 6272047, at \*3 (N.D. Ill. Dec. 1, 2018) (“*White Mountains* recognized only a very narrow  
 31 exception to the prohibition on assignment of legal malpractice claims: such claims may be  
 32 assigned when the assignment is only a small, incidental part of a larger commercial transfer  
 33 between insurance companies.”); *In re Gabriel Techs. Corp.*, 2017 WL 6016287, at \*3 (Bankr.  
 34 N.D. Cal. Dec. 4, 2017) (*White Mountains* recognized exception where the assignment “was only  
 35 a small, incidental part of a larger commercial transfer”).

1       Curtis, 73 Cal. App. 4th at 505 (prohibiting assignment from company to its sole owner); *Baum v.*  
 2       *Duckor, Spradling & Metzger*, 72 Cal. App. 4th 54, 58 (1999) (prohibiting assignment from  
 3       debtor to creditor); *Kracht*, 219 Cal. App. 3d at 1022 (prohibiting assignment between  
 4       adversaries); *Jackson*, 210 Cal. App. 3d at 346 (same).

5       Assignees rely on a single, unpublished federal case to support their proposed “clear  
 6       nexus” exception. Opp. 7. But the *3123 SMB* decision was not so broad. There, the assignment  
 7       occurred “as part of a larger assignment that included the property at issue in the underlying  
 8       lawsuit,” so the case was not analogous “to situations involving ‘the assignment of a bare cause of  
 9       action for fraud.’” *3123 SMB LLC v. Horn*, 2015 WL 13762612, at \*2 (C.D. Cal. Apr. 13, 2015).  
 10      Here, Solarmore’s assignment involved no more than bare claims. *See ECF 52.*<sup>5</sup>

11      Finally, special policy concerns counsel against assignment where, as here, the assignee is  
 12      a client’s former adversary. “If an attorney perceives that his current adversary might some day  
 13      be entitled to sue him for malpractice,” he may hesitate to pursue his clients’ interests vigorously  
 14      “for fear of providing motivation . . . for a later malpractice action.” *Kracht*, 219 Cal. App. 3d at  
 15      1024. That is precisely what happened in this case: Nixon represented Solarmore (the Plaintiff) as  
 16      investor in the underlying transaction, and the Funds (the Assignees here) stood on the other side,  
 17      as investees. *See Waymo LLC v. Uber Techs., Inc.*, 2017 WL 2485382, at \*12 (N.D. Cal. June 8,  
 18      2017) (describing an investor and potential investee as “adversar[ies] because they were  
 19      on opposite sides of a potential transaction”). As in *Jackson*, permitting Solarmore to assign its  
 20      claims would undermine “several important policy considerations,” including “the need to  
 21      preserve the element of trust between attorney and client, which could be impaired if the attorney  
 22      perceives a future threat of the client’s assignment to a stranger or adversary of a legal  
 23      malpractice claim.” *Jackson*, 210 Cal. App. 3d at 347–48. Allowing assignment would also  
 24      “generate increased malpractice lawsuits”<sup>6</sup> and “encourage commercialization of claims.” *Curtis*,

25  
 26      <sup>5</sup> Even if *3123 SMB* applied, the Ninth Circuit subsequently rejected reading the *White Mountains*  
 27      holding more broadly than its facts. *See In re S&B Surgery Ctr.*, 707 F. App’x at 929.

28      <sup>6</sup> This is particularly true if, as in *Jackson*, Solarmore’s assignment occurred in the context of a  
 settlement agreement. *Jackson*, 210 Cal. App. 3d at 348. If litigants may obtain more favorable  
 terms by assigning malpractice claims in settlement, the number of claims will skyrocket.

1 73 Cal. App. 4th at 505.

2 California law simply does not support the broad exception that Assignees advance for  
 3 parties with a “clear nexus,” and instead prohibits the assignment of claims at issue here.

4 **3. Assignees lack independent standing to assert Solarmore’s claims.**

5 Finally, Assignees make a Hail Mary argument that they have “independent standing to  
 6 sue Nixon for legal malpractice as intended third-party beneficiaries.” Opp. 9. But of course,  
 7 Assignees have not joined this suit as parties and brought claims as third-party beneficiaries;  
 8 rather, they are attempting to prosecute the action as Assignees of Solarmore’s claims.<sup>7</sup> “An  
 9 assignee ‘stands in the shoes’ of the assignor” and accedes only to rights that can be “no greater  
 10 than those of the assignor.” *Casiopea Bovet, LLC v. Chiang*, 12 Cal. App. 5th 656, 663 (2017);  
 11 *see also Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (holding  
 12 that an assignee has standing “to assert the injury in fact *suffered by the assignor*”) (emphasis  
 13 added). Because Solarmore does not allege in the Complaint that it is a third-party beneficiary of  
 14 Nixon’s services, the Assignees cannot base their standing on such a claim.

15 In sum, Assignees lack standing to prosecute claims that are nonassignable under  
 16 California law and thus the Complaint must be dismissed. *See Curtis*, 73 Cal. App. 4th at 503,  
 17 507 (dismissing assignees’ legal malpractice claims for lack of standing). And because  
 18 Assignees’ have not shown “a reasonable probability [this] pleading defect can be cured by  
 19 amendment,” the Complaint should be dismissed with prejudice. *Baum*, 72 Cal. App. 4th at 63.

20 **B. Assignees lack standing to pursue derivative claims.**

21 The Complaint should also be dismissed for the independent reason that Solarmore lacks  
 22 standing to seek the derivative losses alleged in this direct action, as Judge Mendez recently held  
 23 in the related *Solarmore I* action. Nothing in Assignees’ Opposition overcomes that defect.

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24  
 25 <sup>7</sup> Assignees separately sued Nixon in Los Angeles Superior Court in December 2019 for hundreds  
  of millions of dollars, based on claims arising out of the *exact same* transactions at issue here,  
  including a malpractice claim, among others. *See Declaration of Christine M. Zaleski in Support  
  of Defendants’ Motion to Dismiss*, Ex. E ¶¶ 516-21. *Solar Eclipse v. CohnReznik*, Case No.  
  19STCV45775. That case is nearing the close of discovery and set for trial next summer. Even if  
  Assignees had brought independent claims here—they have not—this Court can and should  
  exercise its discretion to abstain from hearing claims that are pending in a mature, parallel state  
  action. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 820 (1976).

1           Assignees fail to distinguish their Complaint from Judge Mendez's two orders dismissing  
 2 claims in the substantially similar *Solarmore I* action for lack of standing. *See Solarmore I*,  
 3 2021WL 3077470, at \*2 (E.D. Cal. July 21, 2021) ("*Solarmore I* 2021 Ord."); *Solarmore I*, 2022  
 4 WL 358245 (E.D. Cal. Feb 7, 2022) ("*Solarmore I* 2022 Ord."). To determine if claims are  
 5 derivative, the Court must focus on whether the loss alleged is incidental or direct, not on the way  
 6 the claims were styled. *See Eurolog Packing Grp., N. Am., LLC v. EPG Indus., LLC*, (JEMX),  
 7 2019 WL 1873295, at \*3 (C.D. Cal. Feb. 14, 2019). Here, as in *Solarmore I*, the Complaint  
 8 impermissibly seeks damages resulting out of the "destruction of or diminution in the value of . . .  
 9 [a shareholder's] stock." *PacLink Commc'ns Int'l, Inc. v. Super. Ct.*, 90 Cal. App. 4th 958, 965  
 10 (2001). Specifically, Solarmore claims losses resulting from the Funds' investments in the MSGs,  
 11 including the "loss of its expectation profits from the sale of the MSGs" (profits which could only  
 12 ever go to the Funds that owned the MSGs) and "the cost of acquiring one percent in each of the  
 13 Funds" (the value of which diminished following DC Solar's collapse). Compl. ¶ 110, 121, 129.  
 14 In *Solarmore I*, the Court found similar damages resulting "from the Funds' investment in the  
 15 MSGs" could not be sought by direct action. *Solarmore I* 2022 Ord., 2022 WL 358245, at \*3. The  
 16 Court should hold the same here.<sup>8</sup>

17           In their Opposition, Assignees focus on just one claim for relief that they contend "cannot  
 18 be the Funds' damages": attorneys' fees paid to Nixon. Opp. 13-14, 17; Compl. ¶ 38. To avoid  
 19 dismissal, "a plaintiff must demonstrate standing for each claim he seeks to press" and  
 20 "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*,  
 21 547 U.S. 332, 335 (2006). Assignees make no attempt to explain why their claims for loss of  
 22 expectation profits, the cost of Solarmore's investment, the cost of locating MSGs, or tax losses  
 23 are direct damages, despite authority to the contrary. *See Solarmore I* 2022 Ord., 2022 WL

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24  
 25           <sup>8</sup> The smaller categories of damages concerning "expenses to locate the . . . MSGs that existed"  
 26 and "penalties and interest to the IRS" are also not direct damages. Compl. ¶ 110. In *Solarmore I*  
 27 the court expressly prohibited Solarmore from seeking recovery for the "cost of locating the  
 28 MSGs" and "resulting tax losses" as derivative damages. *Solarmore I* 2022 Ord., 2022 WL  
 358245, at \*3. Other categories of damages allege harm to the Jansens individually, who have  
 been voluntarily dismissed from this case, including "costs of acquiring the hundred percent  
 ownership in Solarmore Management" and "any damages that result from the personal guarantees  
 that were required in each of the Fraud Documents." Compl. ¶¶ 110, 121, 129.

1 358245, at \*3. Moreover, these undisputed categories, including \$70,000,000 in “loss of  
 2 expectation profits,” dwarf the \$608,000 claim for attorneys’ fees. Compl. ¶ 110, 81. Because the  
 3 vast majority of the damages are derivative in nature, “the gravamen of the wrong alleged in the  
 4 pleadings” is centered on harm to the Funds, not Solarmore. *PacLink*, 90 Cal. App. 4th at 965.

5 Assignees further attempt to distinguish *Solarmore I* by arguing that here “Solarmore  
 6 seeks redress for harm that Nixon caused Solarmore by inducing Solarmore to form and invest in  
 7 the Funds.” Opp. 13. But that argument is inconsistent with the allegations in the Complaint. The  
 8 Complaint alleges that the “*Carpoffs* would create investment funds,” not Solarmore. Compl.  
 9 ¶ 22. In *Sutter v. General Petroleum Corp.*, 28 Cal. 2d 525 (1946), on which Assignees rely, “the  
 10 Court found that the plaintiff . . . was personally induced to form a corporation, and the  
 11 subsequent loss in value of his stock was a measure of his damage for the fraudulent  
 12 inducement,” *Drazan v. Atl. Mut. Ins. Co.*, 2010 WL 2629576, at \*3 (N.D. Cal. June 29, 2010).  
 13 Here, Solarmore admits that it did not create the Funds, Compl. ¶ 22, and it experienced only a  
 14 derivative injury resulting from losses “from the *Funds*’ investment in the MSGs.” *Solarmore I*,  
 15 2022 Ord., 2022 WL 358245, at \*3. *Sutter* and its progeny are inapt.

16 Finally, Assignees argue that three of the Counts—for breach of fiduciary duty, breach of  
 17 contract, and legal malpractice—are based on duties that Nixon owed to Solarmore directly. Opp.  
 18 14. But again, in determining whether Solarmore is bringing a derivative or direct action, the  
 19 Court looks at “the nature of the wrong and to whom the relief should go,” *not* the style of the  
 20 claim. *Hammett v. Sherman*, 2021 WL 4692949, at \*11 (S.D. Cal. Oct. 7, 2021). The enumerated  
 21 claims primarily seek damages for expectation profits and the cost of acquiring a stake in the  
 22 Funds. Compl. ¶ 110, 121, 129, 152. Those are damages that result from the “destruction of or  
 23 diminution in the value of [Solarmore’s] stock.” *PacLink*, 90 Cal. App. 4th at 965. They are  
 24 derivative in nature and subject to dismissal.

25 **C. The Complaint fails to allege sufficient facts to sustain each claim.**

26 Assignees do not dispute that their Negligent Misrepresentation, Aiding and Abetting  
 27 Negligent Misrepresentation, and Breach of Fiduciary Duty claims sound in fraud, and are subject  
 28 to the heightened Fed. R. Civ. P. 9(b) pleading standard. Because each fails to allege “the who,

1 what, when, where, and how of the misconduct charged,” they should be dismissed. *See Vess v.*  
 2 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotations omitted). The  
 3 remaining claims fail to allege sufficient facts “to support a cognizable legal theory.” *Shroyer v.*  
 4 *New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

#### 5           **1. Negligent Misrepresentation, Breach of Fiduciary Duty (Counts IV, I)**

6           The Negligent Misrepresentation (Count IV) and Breach of Fiduciary Duty (Count I)  
 7 claims are based on the same insufficiently pleaded alleged misrepresentations and fail under  
 8 Rule 9(b). *See Opp.* 17. It is black-letter law that “[v]ague or conclusory allegations are  
 9 insufficient to satisfy Rule 9(b)’s ‘particularity’ requirement.” *Leonberger v. Wells Fargo Bank*,  
 10 2013 WL 3242298, at \*2 (N.D. Cal. June 25, 2013). Assignees thus must allege the “specific  
 11 content of the false representations” to avoid dismissal. *Swartz v. KPMG LLP*, 476 F.3d 756, 764  
 12 (9th Cir. 2007) (internal quotations omitted).

13           In their Opposition, Assignees fail to identify with particularity the alleged  
 14 misrepresentation underlying Counts IV and I. Instead, they parrot the vague language of the  
 15 Complaint, stating that “Nixon . . . misrepresented the Value of the MSGs in the Tax Opinions.”  
 16 Opp. 15. While the Assignees submitted a Tax Opinion<sup>9</sup> for the Court’s consideration, they fail to  
 17 identify any statement in that 103-page document constituting a representation about the MSGs’  
 18 value. *Swartz*, 476 F.3d at 764. Why? Because Nixon **never represented** the value of MSGs in it.  
 19 Because Assignees fail to identify the “specific content” of the alleged misrepresentation, the  
 20 vague allegation that Nixon misrepresented of “the Value of the MSGs” is insufficient. *Id.*

21           Assignees also base their claims on Nixon’s alleged representation that “the Funds were  
 22 not under audit.” Opp. 16. Assignees again do not allege with particularity where or how Nixon  
 23 purportedly misrepresented whether the Funds were under audit, failing to point to any language  
 24 in the Tax Opinion to support their claim. *Id.* The allegations in the Complaint undermine the  
 25 claim that the audit could plausibly have been misrepresented: Plaintiff alleges Nixon **disclosed**

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 27           <sup>9</sup> See Exhibit A to the Declaration of Stephen Sorenson; *see also Lee v. City of Los Angeles*, 250  
 28 F.3d 668, 688 (9th Cir. 2001) (documents that “are not physically attached to the complaint . . .  
       may be considered [on a motion to dismiss] if the documents’ authenticity is not contested and  
       the plaintiff’s complaint necessarily relies on them”) (internal quotations omitted).

1 the IRS audit to Carpoff when he was Solarmore's majority owner and manager. *Id.* ¶¶ 60-62; 19-  
 2 21; 76. By disclosing the audit to Carpoff, Nixon disclosed the audit to Solarmore. *See Moore v.*  
 3 *Phillips*, 176 Cal. App. 2d 702, 709 (1959) ("That a corporation can have knowledge only  
 4 through its officers and agents is elementary."). Finally, Assignees fail to explain how  
 5 Solarmore's knowledge of the audit would have affected its actions, given that the audit is not  
 6 alleged to have resulted in any adverse action against the taxpayer, and thus fail to allege reliance.

## 7           **2. Aiding and Abetting Negligent Misrepresentation (Count VII)**

8           Assignees attempt to re-write the Aiding and Abetting Negligent Misrepresentation claim  
 9 (Count VII) to avoid dismissal. Count VII alleges that the "Principals" induced "the execution" of  
 10 the "Fraud Documents" as part of "the strategy for Jansen to become the one-hundred percent  
 11 owner of Solarmore Management[.]" Compl. ¶ 158. The Opposition pivots to rely on a factual  
 12 allegation that "[t]he Principals ensured that Jansen was informed that the MSGs had a [certain]  
 13 value." Opp. 16 (quoting Compl. ¶ 80). Both allegations fail to answer the newspaper questions:  
 14 who, what, when, where, and how the statement was made. As to the former statement, Assignees  
 15 concede that the allegations are insufficient by failing to address them. *See Brown v. Takeuchi*  
 16 *Mfg. Co. (U.S.), Ltd.*, 2021 WL 3723218, at \*4 (E.D. Cal. Aug. 23, 2021) ("Failure to oppose an  
 17 argument raised in a motion to dismiss constitutes waiver of that argument."). As to the latter,  
 18 although the Complaint alleges that the "Principals" made this statement, the alleged "Principals"  
 19 are not identified with particularity and include individuals such as "the Carpoffs" and  
 20 unspecified "others." Compl. ¶ 62. While the Opposition speculates that DC Solar's accountant,  
 21 Ronald Roach, was the speaker, the Complaint does not so allege, nor does it explain what, if  
 22 anything, Nixon had to do with Roach in connection with that statement. *Id.* ¶ 80. The statement  
 23 that an unspecified group "ensured Jansen was informed" of certain information fails to plead the  
 24 requisite "what" or "specific content" of the allegedly fraudulent statement, as well as when,  
 25 where, and how the statement was made. *Swartz*, 476 F.3d at 764.

## 26           **3. Legal Malpractice (Count V)**

27           Count V, legal malpractice, fails to allege sufficient facts to give rise to a plausible claim.  
 28 The Complaint alleges in conclusory fashion that Nixon breached a duty to Solarmore but does

1 not allege any specific act or omission amounting to breach. Compl. ¶ 150. The vague allegation  
 2 that Nixon “perpetuat[ed] the Fraud Documents” is insufficient to provide notice of the claim. *Id.*

3 Recognizing this weakness, Assignees pivot in their Opposition to rely on the allegations  
 4 underlying their Negligent Misrepresentation claim. Opp. 17. But such a claim based on an  
 5 alleged misrepresentation is subject to Rule 9(b)’s heightened pleading standard. *See Vess*, 317  
 6 F.3d at 1103-04; *see also Ivey v. Spilotro*, 2012 WL 2788980, at \*10 n.1 (D. Nev. July 9, 2012)  
 7 (applying Rule 9(b) to legal malpractice claim). To the extent Count V is based on purported  
 8 misrepresentations, it fails for the reasons described above in Section II.C.1.

#### 9           **4.       Breach of Contract (Count II)**

10          Assignees misconstrue Nixon’s argument for why the Breach of Contract claim (Count II)  
 11 should be dismissed. Opp. 18. Nixon does not quibble with facts underlying the claim. Instead,  
 12 the Complaint fails to allege any legally cognizable contractual duty that Nixon breached. The  
 13 contract here is one for legal services. Compl. ¶ 123. Assignees contend that Nixon breached the  
 14 contract when Nixon “incorrectly advised Solarmore.” Opp. 18. But California law is  
 15 unambiguous that attorneys have no implied contractual obligation to render 100% accurate legal  
 16 advice. Courts hold that “in the absence of an *express agreement*,” an attorney is *not* “an insurer  
 17 of the soundness of his opinions or of the validity of an instrument that he is engaged to draft.”  
 18 *Kirsch v. Duryea*, 21 Cal. 3d 303, 308 (1978). Here, no express agreement is alleged. As a result,  
 19 the claim that Nixon failed to provide accurate legal advice is insufficient to constitute breach.

#### 20           **5.       Unjust Enrichment (Count III)**

21          Assignees fail to address Nixon’s argument that “a claim for unjust enrichment cannot  
 22 stand alone as an independent claim for relief.” *Iezza v. Saxon Mortg. Servs., Inc.*, 2010 WL  
 23 3834041, at \*2 (C.D. Cal. Sept. 28, 2010); Mot. 20. Assignees thus waived any argument in  
 24 response. *See Brown*, 2021 WL 3723218, at \*4.

#### 25           **III. CONCLUSION**

26          Nixon respectfully requests that the Court dismiss the Complaint with prejudice and grant  
 27 its unopposed Request for Judicial Notice filed with the Motion to Dismiss at ECF 58-7.  
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1 Dated: July 22, 2022

KEKER, VAN NEST & PETERS LLP

2  
3 By: s/ Elliot R. Peters

4 ELLIOT R. PETERS  
ERIC H. MACMICHAEL  
JULIA L. ALLEN  
BENJAMIN D. ROTHSTEIN  
BAILEY W. HEAPS  
DEEVA SHAH  
CHRISTINE M. ZALESKI

5  
6  
7 Attorneys for Defendants  
8 NIXON PEABODY LLP and  
9 FORREST DAVID MILDER

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